

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
SUPPLEMENTAL
BRIEF**

75-2042

Docket No. 75-2042

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

STANLEY ROTHSCHILD,

Petitioner-Appellant,

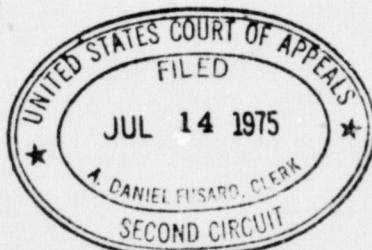
-against-

STATE OF NEW YORK, COMMISSIONER
OF CORRECTIONAL SERVICES, HONO-
RABLE GEORGE ROBERTS, Acting Jus-
tice of the Supreme Court of the
State of New York, New York Coun-
ty,

Respondent-Appellees.

On Appeal from the United States
District Court for the Southern
District of New York

SUPPLEMENTAL BRIEF FOR RESPONDENTS-
APPELLEES



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SUPPLEMENTAL BRIEF FOR RESPONDENTS-
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STATEMENT

This supplemental brief is submitted, by leave of
the Court, to consider the applicability of United States v.
Hale, _____ U.S. _____, 43 U.S.LW 4806 (June 23, 1974) to
the instant case, in which decision was reserved.

POINT

In United States v. Hale, _____ U.S. _____ 43 U.S.
L.W. 4806 (6-24-75) the defendant was arrested for robbery
after being pointed out in the street as one of the robbers

by the victim. He was taken to the police station and advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). A large sum of money was found in Hale's pocket. An officer asked Hale where he got the money. Hale made no response. At his trial, Hale testified in his own behalf and denied his participation in the robbery. He also explained the money found in his pocket by claiming that he had just cashed his wife's welfare check. The prosecutor, seeking to impeach Hale, elicited from him on cross-examination that he did not tell the police where the money came from at the time of his arrest. Hale was found guilty of the robbery.

On a writ of certiorari to the Supreme Court Hale argued that the prosecutor's cross-examination about his post-arrest silence violated his Fifth Amendment right to remain silent. The Government argued that this cross-examination of Hale was constitutionally permissible under Harris v. New York, 401 U.S. 222 (1971). The Supreme Court did not reach the constitutional issue, but instead held the cross-examination impermissible "in the exercise of our supervisory authority over the lower federal courts" 43 U.S.L.W. at 3409.

The court's conclusion was based on its finding that "the probative value of [Hale's] pretrial silence in this case was outweighed by the prejudicial impact of admitting it into evidence" (emphasis supplied) 43 U.S.L.W. at 4806. The Courts decision focused almost entirely on the lack of probative value

of Hale's pre-trial silence. Since there were so many "alternative explanations" for the pretrial silence, it was not "sufficiently probative of an inconsistency with his incourt testimony to warrant admission." The Court reasoned that an arrestee like Hale who is asked a question after he is arrested might remain silent because "he may not have heard or fully understand the question, or may have felt there was no need to reply." Or, he may be intimidated and "may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention" (43 U.S.L.W. at 4807). Or, after having just been given the Miranda warnings, he might simply be relying on his right to remain silent (43 U.S.L.W. at 4807-08).

None of these factors apply in this case. Rothschild could not have been intimidated or confused by hostile custodial interrogation. He was a police officer quite familiar with the criminal process. And, as far as the record shows, there was no custodial interrogation, hostile or otherwise. Nor could Rothschild have been relying on the fact that he had been advised by governmental authorities "only moments earlier that he has a right to remain silent, and that anything he does say can and will be used against him in court." (43 U.S.L.W. at 4807-8). Again, as far as the record shows, there were no such warnings here (because there was no interrogation).

Most importantly, though, Hale's pre-trial silence was not necessarily inconsistent with his trial testimony.

There was nothing inherent in the circumstances of his arrest that would naturally have compelled someone like Hale to speak and explain the presence of money in his pocket. The opposite is true concerning Rothschild. As we have argued in our brief, it is incredible that any police officer in Rothschild's position would not have spoken out and told the police who arrested him that he was acting in furtherance of his police duties (Brief, pp. 10-11).

Thus, Rothschild's pretrial silence, unlike Hale's, was clearly inconsistent with his subsequent testimony at trial. Accordingly, even if this Court had supervisory authority over the state court in which Rothschild was convicted, and were to apply the stringent, non-constitutional standards announced in Hale, Rothschild's pretrial silence would be admissible into evidence. Certainly, nothing in Hale suggests that the cross-examination here failed to meet the constitutional standards enunciated in Harris v. New York, supra, and the other cases cited in our main brief.

We would also like to note that the issue of harmless error was not briefed or argued in Hale. Nor could the Government have raised his claim because Hale's conviction was based upon a single eye-witness identification. (Cf. our main brief pp. 18-19). Finally, petitioner's erroneous claim that the prosecutor in his summation commented upon Rothschild's post-arrest silence, repeated once again in his supplemental brief,

has already been answered in our main brief, ftn. at p. 10.

CONCLUSION

The order appealed from should be affirmed.

Respectfully submitted,

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